

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ALAN ROBERT BRAZEE,

Appellant.

No. 36979-6-II

UNPUBLISHED OPINION

Armstrong, J. — Trooper Darrin Whalen attempted to pull Alan Robert Brazee over for driving without a seatbelt. Brazee fled from the trooper. Deputy Andrew Guerrero confronted Brazee, and Brazee pointed a gun at the deputy. A jury convicted Brazee of eluding a police officer, hit and run, unlawful possession of a firearm, and first degree assault on a police officer. On appeal, Brazee contends the trial court erred by admitting impeachment evidence that he was driving a stolen vehicle, and by allowing unresponsive testimony from Deputy Guerrero. Brazee also claims his counsel ineffectively represented him and that cumulative error entitles him to a new trial.<sup>1</sup> Finding no error, we affirm.

**FACTS**

On September 21, 2005, Trooper Whalen observed Brazee and Rachelle Norman riding without seatbelts and attempted to pull the car over. Brazee refused to stop and began driving

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<sup>1</sup> Brazee also assigned error to the trial court's failure to hold an evidentiary hearing after a mental health report concluded he was competent to stand trial. Brazee withdrew this claim in light of *State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009). *Heddrick* held that a defendant may waive his procedural due process right to the competency procedures under chapter 10.77 RCW by failing to maintain a challenge to his competency to stand trial. *Heddrick*, 166 Wn.2d at 909. Brazee did not challenge the trial court's competency ruling and, thus, waived his right to complete any unfulfilled competency procedures under chapter 10.77 RCW.

erratically. He drove through an intersection and hit another car. He then lost control of the vehicle and drove off the road, hitting a telephone pole, a fence, and a house. Brazee abandoned the car and fled on foot. When Deputy Guerrero confronted Brazee in a nearby yard, Brazee pointed a gun at the deputy, who then shot him in the leg. After an unsuccessful attempt to shoot himself in the head, Brazee surrendered.

Brazee testified that he pointed the gun at Deputy Guerrero to provoke the deputy into shooting him. He explained that during an earlier prison term for burglary and possessing stolen property, he experienced panic attacks, took antipsychotic medication, and was transferred to the Special Offender Complex in Monroe for mentally ill inmates. Brazee testified that he fled from Trooper Whalen because he was driving without a license and was storing a friend's gun in his car, which he knew was a felony due to his prior convictions, and he did not want to return to prison. When Deputy Guerrero caught up with him, Brazee quit trying to escape and decided to commit suicide rather than return to prison. He pointed his gun at Deputy Guerrero, hoping the deputy would kill him. Brazee testified that he never intended to shoot Deputy Guerrero.

The State charged Brazee with first degree attempted murder, first degree assault, unlawful possession of a firearm, eluding a pursuing police vehicle, and hit and run. Brazee admitted to unlawful possession, eluding, and hit and run. At trial, the parties agreed that the key issue was whether Brazee intended to shoot Deputy Guerrero. A jury found Brazee guilty of first degree assault, but it acquitted him of attempted murder.

Brazee assigns error to the admission of impeachment testimony that he was driving a stolen car. During trial, the prosecutor informed the jury in his opening statement that Brazee

was driving a stolen vehicle on September 21, 2005. Trooper Whalen testified that when he asked Norman about the driver's identity, she pretended not to know, but she said it was a man who told her to run "because the vehicle was stolen." 5 Report of Proceedings (RP) at 262. Norman testified that Brazee purchased the car from a friend about a week before the crime. Brazee testified that he purchased the car from a friend for \$400 on September 20, 2005, his friend assured him the transaction was legitimate, and he received paperwork that he thought was the title to the car. The State then called the owner of the vehicle and the officer who reported the incident to testify that the car was stolen on September 19, 2005. Defense counsel objected on the grounds that the issue was collateral, irrelevant, and prejudicial. The trial court ruled the evidence admissible for impeachment purposes only and instructed the jury not to consider it for any other purpose.

Brazee also assigns error to unresponsive testimony from Deputy Guerrero. On direct examination, Deputy Guerrero testified that when Brazee drew his gun he said, "You . . . better f\*\*\*ing kill me." 6 RP at 404. The deputy then testified on re-direct that Brazee said, "You better . . . f\*\*\*ing kill me, [be]cause I'm gonna kill you." 6 RP at 460. On re-cross, defense counsel asked:

Q: You didn't remember earlier when I asked you about what Mr. Brazee said that he said "I'm gonna kill you." You didn't remember that about an hour ago when I was asking you questions, did you?

A: You know, sir, I'm trying to put this behind me. I want to forget about how I met Mr. Brazee and how we had to cross paths. I want to forget it to the point where I want to be able to look him in the eye and tell him I forgive him for this.

Q: Officer, with all due respect—

A: No. If you are going to ask me a question, I'd like to answer it.

[Defense counsel]: Your Honor, I would ask the witness answer my question.

The Court: I'm going to allow him to finish his answer.

[Defense counsel]: All right. Go ahead.

A: I want to put this behind me, and it's affected me more than I thought it would. It's affected my family. When an officer is involved in a shooting, it doesn't only involve the officer. It involves his family. And, yeah, I want to forget about this. And I also want to tell him I forgive him. As a Christian, I feel I owe him that.

Q: And I think we all understand that. But, the point is that today, two years after this event, a very traumatic event, one which you want to put behind you, your memory of this event isn't as good as it was on the day of the event; isn't that true?

A: I'd have to agree with you, saying that it probably would not be as accurate. . .

6 RP at 464-65. Finally, Brazee argues that his counsel was ineffective and that cumulative error violated his right to due process.

## ANALYSIS

### I. Admission of Evidence

#### A. Standard of Review

We review evidentiary rulings for abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009).

#### B. Impeachment Testimony

Brazee argues that the State's evidence regarding the stolen vehicle was impermissible "impeachment by contradiction" evidence. Br. of Appellant at 28. When evidence contradicts substantive testimony from a witness, it is considered impeachment by contradiction. *See Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788, 498 P.2d 870 (1972). Impeachment by contradiction is merely the process of offering relevant, substantive rebuttal evidence and, consequently, must be independently admissible under the usual rules of

evidence. *See Jacqueline's Washington*, 80 Wn.2d at 788-89; *State v. Hubbard*, 103 Wn.2d 570, 576, 693 P.2d 718 (1985); *see generally* Karl B. Tegland, Wash. Prac. § 607.17, at 407 (5th ed. 2007). The trial court's limiting instruction in this case shows that the court did not believe the evidence was independently admissible for a purpose other than impeachment. We may affirm the trial court's ruling on any ground, however, even though the court did not consider that particular ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). We hold that the stolen vehicle testimony was independently admissible under the res gestae doctrine.

While evidence of other crimes or misconduct is generally inadmissible under ER 404(b), misconduct that is part of an unbroken sequence of events surrounding the charged offense is admissible under the res gestae exception in order to "complete the story of the crime." *State v. Brown*, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997); *see also State v. Schaffer*, 63 Wn. App. 761, 769, 822 P.2d 292 (1991); Karl B. Tegland, Wash. Prac. § 404.18, at 526 (5th ed. 2007). The stolen car was directly involved in two of the crimes charged—eluding a police officer and hit and run—and the jury could have inferred from the State's evidence that Brazee was aware he was driving a stolen car and this was one of his motives for attempting to elude Trooper Whalen. Moreover, driving a stolen car provided an additional motive for Brazee to shoot Deputy Guerrero while attempting to escape. The stolen vehicle was part of an unbroken sequence of events surrounding the crimes charged and was relevant to Brazee's intent when he pointed his gun at the deputy. It was therefore admissible.

Furthermore, the admission of improper impeachment evidence is harmless if it did not affect the trial outcome. *State v. Allen*, 50 Wn. App. 412, 423, 749 P.2d 702 (1988). Brazee

argues this impeachment evidence was prejudicial because the verdict for first degree assault turned on whether the jury found him credible when he testified that he did not intend to shoot Deputy Guerrero. But Brazee's testimony had already been impeached by two prior convictions for crimes of dishonesty—burglary and possession of stolen property. Also, there was overwhelming evidence that Brazee intended to shoot Deputy Guerrero: both the deputy and a witness, Gary Sandoval, testified that they saw Brazee try to squeeze the trigger, but the gun would not fire because it was jammed; Trooper Johnny Alexander testified that Brazee repeatedly said he wanted to die because he had shot at an officer; and Brazee told physicians in the hospital that he had shot at an officer. The significance of the stolen car evidence was minor in the context of the overwhelming evidence as a whole and, therefore, did not prejudice Brazee's defense. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

C. Unresponsive Testimony

Brazee argues that the trial court erred by admitting Deputy Guerrero's unresponsive testimony. When an answer is unresponsive, defense counsel must object on that ground and ask the court to strike the testimony. *Beam v. Beam*, 18 Wn. App. 444, 450, 569 P.2d 719 (1977). An objection is sufficient if a specific basis is apparent from the context of trial. *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992). Brazee argues that asking the court to direct Deputy Guerrero to answer was a specific objection in the context of trial. But asking the court to direct a witness to answer a particular question is not the same as objecting to a subsequent unresponsive answer, and defense counsel did not object to Deputy Guerrero's response or ask the court to strike it. We do not review evidentiary rulings unless a party makes a timely and

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specific objection at trial. RAP 2.5(a); *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). We therefore decline to review this issue.

## II. Ineffective Assistance of Counsel

### A. Standard of Review

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). Both the federal and state constitutions guarantee effective legal representation for a criminal defendant. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. We presume that counsel was effective, a presumption the defendant can overcome by showing that (1) counsel's representation was deficient and (2) the deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). We will find counsel's representation deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant must establish prejudice by showing a reasonable probability that the trial outcome would have been different but for counsel's flawed representation. *Stenson*, 132 Wn.2d at 705-06. To prevail on the claim, the defendant must satisfy both prongs of this test. *Brockob*, 159 Wn.2d at 345.

### B. Stolen Vehicle Testimony

Brazee argues his defense counsel was ineffective for failing to properly object to the prosecutor's reference to the stolen vehicle in his opening statement and to Trooper Whalen's testimony regarding the stolen vehicle. As we previously discussed, the evidence was admissible as part of the full story to show Brazee's motive to flee and whether he intended to shoot Deputy Guerrero. Alternatively, the evidence was harmless. Brazee has not established that counsel's



representation was deficient, or that he was prejudiced.

C. Deputy Guerrero's Testimony

Brazee also faults his counsel for failing to object to Deputy Guerrero's testimony as irrelevant and unfairly prejudicial. Brazee argues this failure prejudiced his defense because the testimony portrayed the deputy in a sympathetic light and likely inflamed the jury against him. To prove that counsel was ineffective for failing to object to evidence, Brazee must show that the failure to object fell below prevailing professional norms, the proposed objection would likely have been sustained, and the evidence affected the trial outcome. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

The challenged testimony arose in the context of defense counsel questioning the accuracy of Deputy Guerrero's memory of the crime. When the deputy testified that he was trying to forget the encounter in order to move on with his life, counsel chose to respond by expressing sympathy and steering the discussion back to the deputy's memory. Counsel then obtained the admission he was seeking—that Deputy Guerrero's memory of the event was not entirely accurate—which was helpful to Brazee's defense. Brazee has not shown that counsel's strategy fell below prevailing professional norms.

Brazee also has not demonstrated that Deputy Guerrero's testimony so inflamed the jury that it prejudiced his defense. "Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial." *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998). But Deputy Guerrero's testimony does not rise to the level of "inflammatory or hyperdramatic events" that "produce passion and prejudice because of their undeniable impact to

induce the jury to violate its oath to deliver a true verdict upon the evidence alone.” *Thompson v. Grays Harbor Cmty. Hosp.*, 36 Wn. App. 300, 311, 675 P.2d 239 (1983) (quoting *James v. Robeck*, 79 Wn.2d 864, 866, 490 P.2d 878 (1971)). Brazee was charged with attempted first degree murder and first degree assault. The jury found him guilty of assault but it acquitted him of attempted murder, demonstrating the jury was not so “inflamed” that it was incapable of rationally assessing the evidence and delivering “a true verdict [based on] the evidence alone.” *Thompson*, 36 Wn. App. at 311.

### III. Cumulative Error

Finally, Brazee argues cumulative error violated his right to due process. “[T]he final measure of error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he was afforded a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The accumulation of errors may deprive a defendant of his right to a fair trial, even though the errors individually constitute harmless error. *State v. Coe*, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984). Because we have found no trial errors, we need not address the cumulative error argument.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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We concur:

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Bridgewater, J.

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Penoyar, A.C.J.